

FCC MAIL SECTION

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Before the
Federal Communications Commission
Washington, D.C. 20554

GC Docket No. 92-223 ✓

In the Matter of

Enforcement of Prohibitions
Against Broadcast Indecency in
18 U.S.C. § 1464

NOTICE OF PROPOSED RULE MAKING

Adopted: September 17, 1992; Released: October 5, 1992

Comment Date: November 6, 1992

Reply Comment Date: November 23, 1992

By the Commission: Commissioners Marshall and Duggan issuing separate statements.

1. On August 26, 1992, the President signed into law the Public Telecommunications Act of 1991, Pub. L. No. 102-356, which generally concerns the authorization of appropriations for the Corporation for Public Broadcasting. Section 16(a) of the Act contains the following provision:

The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming--

- (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
- (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcast station not described in paragraph (1).

Id. § 16(a). The provision further states that the regulations required under this subsection shall be promulgated in accordance with Section 553 of the Administrative Pro-

cedure Act, 5 U.S.C. § 553, and shall become final not later than 180 days after the date of enactment of the Act. *Id.*

2. In conformity with the statute, we propose to adopt the rule set forth in Appendix A, which will prohibit the broadcast of indecent material between the hours of 6 a.m. and 10 p.m. on public broadcast stations¹ that go off the air at or before 12 midnight, and which will prohibit the broadcast of indecent programming on all other broadcast stations between 6 a.m. and 12 midnight. The rule will prohibit obscene broadcasts at all times. In addition, we invite interested parties to update the record on the presence of children in the viewing and listening audience.

3. By way of background, under 18 U.S.C. § 1464, it is unlawful to "utter[] any obscene, indecent, or profane language by means of radio communication." The Commission is empowered to enforce Section 1464 in administrative proceedings by, for example, assessing monetary forfeitures or, in extreme cases, revoking a station's license. See 47 U.S.C. §§ 312(a)-(b), 503(b)(1)(D). Concurrently, Section 326 of the Communications Act prohibits the Commission from engaging in censorship or promulgating regulations "which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326.

4. Unlike obscene speech, which is unprotected by the First Amendment and may thus be banned altogether,² the courts have held that broadcast indecency is constitutionally protected, but may be "channeled" to times when there is not a reasonable risk that children may be in the audience. See generally *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1337-1340 (D.C. Cir. 1988) ("ACT I"); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1507-1508 (D.C. Cir. 1991) ("ACT II"), cert. denied, 112 S.Ct. 1282 (1992). As a basis for regulating indecency, the Supreme Court has recognized the government's compelling interest in protecting children from exposure to indecent materials. See *Sable Communications v. FCC*, 109 S.Ct. at 2836; *FCC v. Pacifica Foundation*, 438 U.S. at 749-750, citing *Ginsburg v. New York*, 390 U.S. 629 (1968).³

5. While the Commission's definition of indecent material consistently has been upheld,⁴ the United States Court of Appeals for the District of Columbia Circuit has twice invalidated particular enforcement programs.⁵ Prior to 1987, the Commission's practice had been generally to withhold sanctions for indecent broadcasts aired after 10 p.m. and preceded by a warning.⁶ In 1987, the Commission indicated that "12:00 midnight [was its] current thinking as to when it was reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased

¹ For purposes of implementing this provision, our rule will define "public broadcast station" as it is defined in Section 397(6) of the Communications Act of 1934, as amended, 47 U.S.C. § 397(6).

² See *Sable Communications of California, Inc. v. FCC*, 109 S.Ct. 2829, 2835-2836 (1989); *Miller v. California*, 413 U.S. 15 (1973).

³ In *Pacifica*, the Supreme Court also recognized the interest in protecting an individual's right to be free from indecent material in the privacy of the home. 438 U.S. 726, 748; see *id.* at 759-60 (Powell, J., concurring).

⁴ The Commission defines broadcast indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards

for the broadcast medium, sexual or excretory activities or organs. The D.C. Circuit Court of Appeals upheld the Commission's use of this definition of indecency most recently in *ACT II*, 932 F.2d at 1509, relying on its prior decision in *ACT I*, 852 F.2d at 1343, and the Supreme Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. at 749-50. In view of these court decisions, the Commission's definition of indecency remains in effect and its modification is not within the scope of this proceeding.

⁵ *ACT I* and *ACT II*, *supra*.

⁶ See *Pacifica Radio*, 2 FCC Rcd 2698 (1987), citing *Pacifica Foundation*, 36 FCC 147 (1964), and *Pacifica Foundation*, 56 FCC 2d 94, 99-100 (1975).

supervision over whatever children remain in the viewing and listening audience."⁷ On appeal, the court in *ACT I* ruled that the Commission had not "adequately justified its new, more restrictive channeling approach" and directed the Commission, in view of First Amendment concerns, to adopt "a reasonable safe harbor rule" establishing the times at which indecent material may be aired. 852 F.2d at 1334 and 1343 n.18.

6. Following *ACT I*, but before the Commission could act on remand, Congress enacted a statute requiring the Commission to enforce the provisions of 18 U.S.C. § 1464 "on a 24 hour per day basis." Pub. L. No. 100-459, Tit. VI, § 608, 102 Stat. 2228 (1988). The Commission responded by promulgating a rule providing for such enforcement. *Order*, 4 FCC Rcd 457 (1988). A court-imposed stay and an appeal of the 24-hour ban followed. The court then granted the Commission's request for remand to develop a record in support of the 24-hour indecency prohibition, or less restrictive channeling alternatives, in light of the Supreme Court's intervening decision in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). See *Notice of Inquiry* in MM Docket No. 89-494, 4 FCC Rcd 8358 (1989).

7. After receiving over 92,500 formal and informal submissions, the Commission issued its *Report* in MM Docket No. 89-494. That report concluded that a 24-hour prohibition on indecent broadcasts is the most narrowly tailored means of effectively promoting the government's compelling interest in protecting children from broadcast indecency because there is a reasonable risk that a significant number of children are in the broadcast audience at all times of day and night. *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd 5297, 5298 (1990 "1990 Report"). In particular, the Commission confirmed the general pervasiveness and accessibility of broadcasts to children: television, available in virtually every household, is viewed an average of 26 hours per week by children ages 2 to 17 years old, and up to 50% of children have a TV set for their personal use; radio is even more pervasive, with each household having an average of over five radios. *Id.* at 5302; see also *Sable*, 109 S.Ct. at 2837; *Pacifica*, 438 U.S. at 748-49. Moreover, the available data on children's listening and viewing habits revealed that a substantial percentage of unsupervised children were in the television and radio audiences at all times, even late at night and early in the morning. *1990 Report*, 5 FCC Rcd at 5302-04.

8. Notwithstanding the Commission's findings, in *ACT II* the court of appeals invalidated the statutory ban on broadcast indecency. The court stated: "[o]ur holding in *ACT I* that the Commission must identify some reasonable period of time during which indecent material may be

broadcast necessarily means that the Commission may not ban such broadcasts entirely." 932 F.2d at 1509. The court concluded:

Our decision today effectively returns the Commission to the position it briefly occupied after *ACT I* and prior to congressional adoption of the [24-hour ban]. The Commission should resume its "plans to initiate a proceeding in response to the concerns raised" in *ACT I* . . .

ACT II, 932 F.2d at 1510. Collectively, *ACT I* and *ACT II* thus hold that the government may not ban indecent broadcasts altogether. Rather, there must be a time period, when the risk of exposure to children is minimized, during which such broadcasts are permitted.

9. Against this background, Congress enacted the "safe harbor" legislation that is now before us. Congress apparently relied on many of the findings in the Commission's *1990 Report* in establishing the 12 midnight to 6 a.m. channeling approach set out in Section 16(a). See 138 Cong. Rec. S7308 (daily ed. June 2, 1992) (statement of Sen. Byrd quoting *1990 Report*); *id.* at S7309-7322 (statement of Sen. Helms placing *1990 Report* into legislative record). In enacting the new channeling scheme, Congress has balanced the competing interests affected by the regulation of broadcast indecency and has determined that a 12 midnight to 6 a.m. safe harbor properly effectuates those interests.⁸ The focus of this proceeding is, thus, quite narrow and will be confined to the matter of updating the Commission's record pertaining to the governmental interest in restricting the broadcasting of indecent material. Accordingly, we invite the public to update the data considered in the *1990 Report* with regard to the presence of children⁹ in the viewing and listening audience.¹⁰

10. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules. See 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **November 6, 1992**, and reply comments on or before **November 23, 1992**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting material. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the

⁷ *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930, 937 n.47 (1987). In enforcing 18 U.S.C. § 1464, the Commission has considered separately the nature of the material involved -- i.e. whether it is indecent -- and the time a broadcast aired, which is pertinent to whether an indecent broadcast is actionable. See *id.* at 936 n.6; *ACT I* at 1338 n.8.

⁸ We note that, in order to accommodate the interests of public broadcasters who go off the air at or before 12 midnight, Congress has tailored the statute to afford these broadcasters a limited exception to the 6 a.m. to 12 midnight prohibition.

⁹ Based on other federal and state statutes dealing with indecent materials, as well as several Supreme Court decisions recogniz-

ing the compelling government interest in controlling the availability of indecent material to minors, the Commission has defined "children" as those age 17 and under. *1990 Report*, 5 FCC Rcd at 5301. The findings in the *1990 Report* were approvingly cited by the sponsor of the legislation on the Senate floor, 138 Cong. Rec. S7308 (daily ed. June 2, 1992) (statement of Sen. Byrd), and we therefore understand Congress to have concurred in this definition of children and will use it in evaluating the data supplied in this proceeding.

¹⁰ Since much of the record from that proceeding may be relevant here, we shall also incorporate the record from MM Docket No. 89-494 into the record of this proceeding.

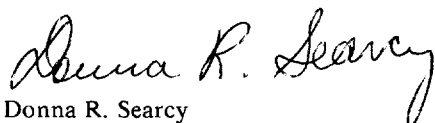
Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

11. As required by Section 603 of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981)), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this *Notice of Proposed Rule Making*, but they must have a separate and distinct heading, designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.

12. Authority for this proceeding is contained in Sections 4(i) and (j), 303 and 312 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 303, 312, and in Section 16(a) of the Public Telecommunications Act of 1991, Pub. L. No. 102-356 (1992).

13. Further information on this proceeding may be obtained by contacting Peter Tenhula, Office of General Counsel, at 202-254-6530.

FEDERAL COMMUNICATIONS COMMISSION



Donna R. Searcy
Secretary

APPENDIX A

PROPOSED RULE

The Commission proposes to amend 47 C.F.R. Part 73 as follows:

PART 73 -- RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

2. Section 73.3999 is revised to read as follows:

§ 73.3999 Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene and indecent material).

(a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.

(b) No licensee of a public broadcast station, as defined in 47 U.S.C. 397(6), that goes off the air at or before 12 midnight shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.

(c) No licensee of a radio or television broadcast station not described in paragraph (b) of this section shall broadcast on any day between 6 a.m. and 12 midnight any material which is indecent.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action.

This proceeding is being initiated pursuant to Pub. L. 102-356, Section 16(a) and seeks public comment on the implementation of that statutory provision.

Objectives.

Our goal in this proceeding is to supplement the Commission's record to support the implementation of Congress' enactment of a "safe harbor" time period for the broadcast of indecent material.

Legal Basis.

Authority for this proposed rule making is contained in Sections 4(i) and (j), 303 and 312 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 303, 312, and in Section 16(a) of the Public Telecommunications Act of 1991, Pub. L. No. 102-356 (1992).

Reporting, Recordkeeping and other Compliance Requirements.

None.

Federal Rules that Overlap, Duplicate or Conflict with Proposed Rule.

None.

Description, Potential Impact, and Number of Small Entities Involved.

The rules proposed in this proceeding could effect certain small entities including radio and television broadcasters who choose to air indecent broadcast materials at times which will subject them to enforcement action by the Commission.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.

None.

STATEMENT OF
COMMISSIONER SHERRIE P. MARSHALL

Re: Enforcement of Prohibitions Against Broadcast Indecency

I am pleased the Commission is moving so swiftly to implement this extension of our indecency enforcement authority which President Bush signed into law just three weeks ago.

By extending our hours of enforcement until midnight, this statute authorizes the Commission to take up the merits of many indecency complaints that it would otherwise have had to dismiss simply because the offending material was aired after 8 p.m. Our previously compiled record, not to mention common sense, leaves little doubt that a significant number of children remain in the nightly listening and viewing audience well beyond 8 p.m.

I look forward to our prompt conclusion of this proceeding and, if necessary, our successful defense of this policy in the courts. In my view, this statute and our proposed rules fully comport with existing judicial interpretations of the First Amendment and, thus, should be expeditiously implemented.

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Separate Statement
of
Commissioner Ervin S. Duggan

In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. Section 1464 (GC Docket No. 92-223)

Our action today responds to a growing concern of Congress and the public that media programming has become too violent, too sexually explicit, too generally unmoored from widely accepted moral norms. The signs of this concern are easy to find:

* A recent Gallup poll suggests that 64 percent of adults--- up 10 percent from a year ago--- believe that current television and cable programs portray "negative values." The respondents, says Gallup, cite a "preoccupation with sex, excessive violence, cursing and foul language and vulgarity."

* A new TV Guide study observed 1,846 individual acts of violence in just one day of television fare.

* Fox Entertainment Group President Peter Chernin recently told an audience that Vice President Quayle, when he raises the issue of television's moral values (or lack of them), is clearly responding to a "legitimate, genuine concern" felt by millions of Americans about what they see on TV.

I do not think it an exaggeration to say that the public is losing faith in the people who manage and program the media. This loss of faith could be one reason why the broadcast networks are losing audience share, and one reason why family-oriented cable TV channels are earning growing success.

Because the institutions of government do reflect public opinion, Congress and President Bush have now directed the Commission to establish regulations prohibiting indecent broadcast programming between 6 a.m. and midnight: hours that children can be presumed in the audience in greatest numbers. Although the courts have held that broadcast indecency is constitutionally protected speech, those same courts have stated that it is permissible for the Commission to channel such speech to times when there is less risk that children will be in the audience.

The rules proposed in this proceeding attempt to strike a reasonable balance between the First Amendment rights of broadcasters and the adult audience and the government's compelling interest in protecting young people from indecent broadcasts. I have every reason to believe that the record in

this proceeding will demonstrate that children constitute a significant portion of the broadcast audience until midnight, if not later.

I therefore support the steps that we take today. If broadcasters are concerned about the issue of government intervention in their programming decisions, I can suggest a remedy: that they exercise greater self-restraint in response to what Peter Chernin calls a "legitimate, genuine" public concern. Clearly this is a moral and ethical problem, as well as a legal one--- and so the most effective solution, in my judgment, will come not from government action but from the efforts of broadcasters and programmers to act as responsible electronic publishers and editors. If recent opinion polls are any guide, exercising such decent editorial restraint would improve audience ratings at the same time.

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